Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2024-000765
(PA/55190/2022)

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

On 1st of October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRA
(Anonymity Ordered)

Respondent

Representation:

For the Appellant: Ms H Gilmore, Senior Home Office Presenting Officer
For the Respondent: Ms G Rutherford, Counsel instructed by Roman Pearce Solicitors

Heard at Field House on the 18th September 2024

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. For the sake of convenience, I shall refer to the parties in accordance with their status in the First-tier Tribunal; that is to say, I shall refer to MRA as "the Appellant" and to the Secretary of State as "the Respondent".

2. Although the First-tier Tribunal did not make an anonymity order, I shall do so until such time as all appeal rights have been exhausted. This is with a view to preserving the appellant's anonymity until such time as his status has been finally determined.

3. The Appellant is a citizen of Iran. The respondent refused his protection claim on the 7th November 2022. First-tier Tribunal Judge Young-Harry allowed his appeal against that refusal on the 5th February 2024. The Respondent has been granted permission to appeal against Judge Young-Harry's decision and thus the matter came before me.

Background

4. The appellant's case before the First-tier Tribunal was that he and a friend ('Raza') had distributed leaflets on behalf of a Kurdish separatist party (the KDPI) and that the appellant's uncle had subsequently informed him that his life would be in danger if he remained in Iran. This was because Raza had been arrested and informed the Iranian authorities of the appellant's involvement in distributing KDPI leaflets. Further or in the alternative, the appellant claimed that he was at risk of ill-treatment on return to Iran due to his political activities in the UK, which included posts of a political nature on Facebook.

Findings of the First-tier Tribunal

5. In summary, the First-tier Tribunal Judge found that the appellant's account of his political activities in Iran contained several inconsistencies and implausibilities. The judge did not therefore accept, "any part of the appellant's account regarding his claimed activities or difficulties in Iran" [13]. So far as the appellant's posts on Facebook were concerned, the judge found that "if" the Iranian authorities became aware of them, they would give rise to a risk on return, "even if contrived", and that, "although the appellant can delete his account, he is not required to" [16].

The grounds of appeal and submissions

6. The grounds of appeal can be conveniently summarized as follows:

   (1) The judge erred in assuming that the appellant was under no obligation to delete his Facebook account prior to his return to Iran, without first making a finding as to whether his claimed fears on that account were genuine or contrived;

(2) The judge erred in failing to make a finding as to whether there was a reasonable degree of likelihood that the appellant had already come to the adverse attention of the Iranian authorities by reason of his political activities in the United Kingdom.

7. By way of amplification of those grounds, Ms Gilmore drew attention to the fact that the judge had also failed to make an explicit finding that the appellant's Facebook posts were critical of the Iranian government

8. In response to the first ground, Ms Rutherford realistically accepted that the judge had erred in failing to make the necessary factual finding as to whether the appellant's posts on his Facebook account were genuine or contrived, and thus whether he would likely delete the account if faced with return to Iran. She also accepted that, "the timely closure of an account neutralises the risk consequential on having had a "critical" Facebook Account, provided that someone's Facebook account was not specifically monitored prior to closure" [**XX (PJAK –sur place activities – Facebook) Iran CG** [2022] UKUT 00023 (IAC), at paragraph 103]. She nevertheless submitted that this error was immaterial because, even were the Tribunal to have found that the appellant's Facebook posts were contrived, the Secretary of State would not give him sufficient notice of an application for the issue of an emergency travel document (ETD) so as to enable him to make a 'timely' closure of the account (30 days) and thus to avoid its discovery by the Iranian authorities.

9. In response to the second ground, Ms Rutherford drew my attention to the fact that in the letter explaining the reasons why his protection claim had been refused, the Secretary of State had accepted that the appellant had provided photographic evidence to support his claim to have attended a demonstration in March 2022, in which he is bearing explicitly anti-regime placards outside the Iranian Embassy in London (paragraphs 37 to 44 of the letter). This provided a sufficient evidential basis to support a finding that the appellant was at risk of having already come to the adverse attention of the Iranian authorities. Given that the Secretary of State also accepted that the appellant had posted those photographs on his Facebook page, it also provided an answer to Ms Gilmore's submission that the judge had failed to make an explicit finding that his Facebook account was critical of the Iranian regime.

Analysis

10. The sentence in the judge's decision that gives rise to the first ground reads as follows: "Although the appellant can delete his account, he is not required to". This sentence appears to be based upon a misreading of the guidance given at paragraphs 99 to 103 of **XX (Iran).** After contrasting the position where political loyalty (as opposed to neutrality) is required by militias operating in a receiving country, the Tribunal made the following observations:

99. The key differences in our case are that the Iranian authorities do not persecute people because of their political neutrality, or perceived neutrality; and a returnee to Iran will not face an unpredictable militia, but a highly organised state. In our case, a decision maker is not falling into the trap of applying a test of what a claimant "ought to do," in cases of imputed political opinion. That was counselled against by Beatson LJ in SSHD v MSM (Somalia) and UNHCR [2016] EWCA Civ 715.

100. Instead, in deciding the issue of risk on return involving a Facebook account, a decision maker may legitimately consider whether a person will close a Facebook account and not volunteer the fact of a previously closed Facebook account, prior to the application for an ETD: HJ (Iran) v SSHD [2011] AC 596. Decision makers are allowed to consider first, what a person will do to mitigate a risk of persecution, and second, the reason for their actions. If the person will refrain from engaging in a particular activity, that may nullify their claim that they would be at risk, unless the reason for their restraint is suppression of a characteristic that they have a right not to be required to suppress, because if the suppression was at the instance of another it might amount to persecution. It is difficult to see circumstances in which the deletion of a Facebook account could equate to persecution in this sense, because there is no fundamental right protected by the Refugee Convention to have access to a particular social media platform, as opposed to the right to political neutrality.

101. The second part of our answer relates to Lord Kerr's concern about whether an analysis of what a person will do is too speculative or artificial an exercise. We accept Mr Jaffey's submission that there may be cases where the exercise is too speculative, particularly in the context of a volatile militia. That is not the case here.

102. We consider that it may be perfectly permissible for a decision maker to ask what a returnee to Iran will do, in relation to a contrived Facebook account or fabricated protection claim. Whether such an inquiry is too speculative needs to be considered on a case-by-case basis, but factors which may point to that question not being impermissibly speculative include: where a person has a past history of destroying material, such as identification documents, or deception or dishonesty in relation to dealings with state officials; whether the government has well-established methods of questioning (in the Iranian state's case, these are well-documented and therefore predictable); and whether the risks around discovery of social media material, prior to account deletion, are minimal, because a personal's social graph or social media activities are limited.

What difference does a critical Facebook account (whether deleted or not) make to the risk faced by someone returning to Iran?

103. Closure of a Facebook account 30 days before an ETD is applied for will, in our view, make a material difference to the risk faced by someone returning to Iran, who has a "critical" Facebook account. The timely closure of an account neutralises the risk consequential on having had a "critical" Facebook account, provided that someone's Facebook account was not specifically monitored prior to closure. In contrast, where a critical account has not been closed, the application for an ETD is likely to prompt a basic Google search of a name; and may prompt more targeted surveillance of that Facebook material. Discovery of material critical of the Iranian regime on Facebook, even if contrived, may make

a material difference to the risk faced by someone returning to Iran. The extent of the risk they may face will continue to be fact sensitive. For example, an Iranian person of Kurdish ethnic origin may face a higher risk than the wider population.

11. It is thus clear that the issue for the judge to determine was not, as she suggested, whether the appellant was "required" to delete his account. Rather, it was whether the appellant was likely to do so should he be faced with the prospect of returning to Iran. To decide that question, the Tribunal was first required to decide whether the appellant's posts were genuine or contrived. As previously noted, Ms Rutherford conceded at the hearing that the judge had erred in failing to make an explicit finding that the posts were genuine when assuming that the appellant would not delete them prior to his return. Neither was such a finding implicit within the judge's reasoning, given that she had earlier found that his account of claimed political activities in Iran lacked credibility. I moreover do not accept Ms Rutherford's submission that the option of deleting a Facebook account does not provide a feasible means of neutralising the risk of discovery by the Iranian authorities due to the appellant not receiving notice of the timing of an ETD application. The unpredictability of the timing of an ETD application will of course be a feature of every case. However, the question whether a particular claimant will decide to delete their Facebook acount within the window of opportunity provided by exhausting all appeal rights against an adverse decision in the First-tier Tribunal is a matter that will inevitably be fact-sensitive.

12. Turning to the second ground, whilst it is true that the Secretary of State accepted that the appellant had been politically active in the UK, the question of whether this activity would have come to the adverse attention of the Iranian authorities clearly remained in contention. Both the judge and Dr Ghobadi (the expert whose report was before the Tribunal) acknowledged that the appellant was, "not high profile". This probably amounted to the same thing as the Secretary of State's characterisation of him as "low profile", from which she concluded that there was not a real risk of him having come to the adverse attention of the Iranian authorities. However, having acknowledged at paragraph 19 that the appellant was "not high profile", the judge appears to have adopted Dr Ghobadi's approach that it was, "not possible to know for certain if he will come to the attention of the authorities or if they are already aware of his online activity and the fact that he has attended demonstrations" [emphasis added]. There are few (if any) things in life of which it is possible "to know for certain". What was required of the judge, however, was a reasoned assessment of whether there was a real (as opposed to fanciful) *risk* that the appellant's 'low profile' activities in the UK would have come to the attention of the Iranian authorities. In undertaking that task, it was necessary to have regard to the assistance that can be derived from the guidance provided in the *c*ases of BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC); SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 00308 (IAC); HB (Kurds) Iran CG [2018] UKUT 00430 and XX (Iran) (above). Whilst

the judge made extensive references to those cases, she did not ultimately make the risk assessment that they required of her.

13. I thus have no doubt that both grounds of appeal are made out and that the judge's decision concerning the risk to the appellant arising from his sur place activities should be set aside and remade. That said, there has been no challenge to the judge's adverse findings concerning the appellant's claimed activities in Iran; whether by way of cross-appeal (either side being entitled to appeal a decision of the First-tier Tribunal, even 'the winner') or otherwise. **Those findings should therefore be preserved, and the scope of the remaking will accordingly be confined to an assessment of the risk that the appellant's activities in the UK have and/or will come to the adverse attention of the Iranian authoriti**es. That is not something that will require extensive fact-finding, and it is accordingly appropriate for it to be determined in the Upper Tribunal.

Directions to the parties

14. The parties are directed as follows:

    (i) Any further evidence must be served by the parties upon each other and lodged with the Tribunal by no later than 4 pm on Monday the 25th November 2024;
    (ii) The respondent must serve upon the appellant and lodge with the Tribunal a skeleton argument in support of her position by no later than 4 pm on Monday the 2nd December 2024;
    (iii) The appellant must serve upon the respondent and lodge with the Tribunal a skeleton argument in support of his position by no later than 4 pm on Monday the 9th December 2024;

Listing instructions

15. I direct that the appeal be re-listed on the first available date on or after Monday the 16th December 2024 with a time estimate of 2 hours, and that a Kurdish (Sorani) interpreter be booked to attend the hearing.

16. **All the primary findings of fact that were made by the First-tier Tribunal concerning the appellant's claimed activities in Iran are to be preserved.**

Notice of Decision

17. The appeal is allowed. The decision of the First-tier Tribunal to allow the appellant's appeal is set aside, but subject to the preservation of all its findings of fact.

Judge Kelly: David Kelly Date: 25th September 2024

Deputy Judge of the Upper Tribunal